SUPREME COURT, U. S.
Supreme Court, U.S.
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Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION, *Petitioner*
v.
LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Collateral Proceeding)

FEDERAL POWER COMMISSION, *Petitioner*
v.
LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Curtailment Proceeding)

UNITED GAS PIPE LINE CO., ET AL., *Petitioners*
v.
LOUISIANA POWER & LIGHT CO., ET AL.

UNITED GAS PIPE LINE CO., *Petitioner*
v.
LOUISIANA POWER & LIGHT CO., ET AL.
(FPC Opinion 606)

MOTION THAT THE COURT EN BANC CONSIDER THE PETITIONS FOR WRITS OF CERTIORARI TO REVIEW OPINIONS OF THE FEDERAL POWER COMMISSION

AND

MEMORANDUM UPON BEHALF OF RESPONDENTS MOBILE GAS SERVICE CORPORATION, ET AL., IN RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI AND IN SUPPORT OF MOTION FOR EN BANC CONSIDERATION

JOHN M. KUYKENDALL, JR.
Attorney for respondent
Mississippi Valley Gas Company
P.O. Box 961
Jackson, Mississippi 39205

HOWARD E. WAHRENBROCK
Attorney for respondents
Mobile Gas Service Corporation
Mississippi Valley Gas Company
Clarke-Mobile Counties Gas District
Room 605 1725 K Street, N. W.
Washington, D. C. 20006

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(FPC Opinion 606)

MOTION THAT THE COURT EN BANC CONSIDER THE PETITIONS FOR WRITS OF CERTIORARI TO REVIEW OPINIONS OF THE FEDERAL POWER COMMISSION

Respondents Mobile Gas Service Corporation, Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District hereby respectfully move that the Court *en banc* consider the petitions for writs of

certiorari insofar as they seek to have this Court review opinions of the respondent Federal Power Commission without awaiting a judgment of the court of appeals upon its review of those opinions.

This motion is made to obviate, or at least reduce, the possibility that a grant of certiorari might be followed, after briefs and oral argument, by a decision that the Court does not have jurisdiction and hence that certiorari had been granted improvidently. Such a decision would mean that the grant had delayed rather than expedited an authoritative resolution of the important issues raised by the claimed basis of the Commission's assertion of jurisdiction with respect to curtailment of the service obligations of United Gas Pipe Line Company and the rights of its customers.

Respectfully submitted,

HOWARD E. WAHRENBROCK
Attorney for Respondents
CLARKE-MOBILE COUNTIES GAS DISTRICT,
MOBILE GAS SERVICE CORPORATION,
MISSISSIPPI VALLEY GAS COMPANY,
Room 605, 1725 K Street, N.W.
Washington, D.C. 20006

JOHN M. KUYKENDALL, JR.
Attorney for Respondent
MISSISSIPPI VALLEY GAS COMPANY
P.O. Box 961
Jackson, Mississippi 39205

February 28, 1972.

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MEMORANDUM UPON BEHALF OF RESPONDENTS MOBILE GAS SERVICE CORPORATION, ET AL., IN RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI AND IN SUPPORT OF MOTION FOR EN BANC CONSIDERATION

This memorandum is submitted upon behalf of respondents Mobile Gas Service Corporation, Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District, in response to the petitions for certiorari and

in support of respondents' motion for Court consideration of those petitions *en banc* insofar as they seek review of Commission opinions. These respondents are local distributor gas utility customers of United Gas Pipe Line Company, respondent in No. 71-1016 and petitioner in No. 71-1040. They were parties[1] to the consolidated proceeding[2] before the Federal Power Commission (petitioner in No. 71-1016 and respondent in No. 71-1040) on United's petition, as supplemented, for a declaratory order[3] and on the changes in its filed rate tariff that United later filed.[4] Upon the Commission's issuance of its Opinion 606, which asserted "plenary jurisdiction" in that proceeding, and its Opinion 606A, which denied rehearing, these respondents duly sought review thereof in the United States Court of Appeals for the Fifth Circuit. They also inter-

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[1] Pet. (No. 71-1040) App. E, 83a and n. 1.

[2] *United Gas Pipe Line Company*, Docket Nos. RP71-29, RP71-120, RP71-99.

United Gas Pipe Line Company, petitioner before the Commission for declaratory orders in FPC Docket Nos. RP71-29 and RP71-99 and applicant in Docket No. RP71-120, from time to time sought Commission approval or authorization of a series of programs for curtailment of its delivery obligations. Pet. (No. 71-1040), App. E, 55a-56a, 58a-59a, 74a-75a.

[3] Under § 554(e) of the Administrative Procedure Act, 5 U.S.C. 554(e), R. 865. (The "R" references herein are to the record of the Commission proceedings in Dockets RP71-29, RP71-120, RP71-99 as certified to the court of appeals.)

[4] RP71-120; Pet. (No. 71-1040); App. E, 58a-59a. United's filing was made under the provisions of the Natural Gas Act that require notice of rate changes. Sections 4(d) and 4(e) of the Natural Gas Act, 52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. 717c(d) and 717c(e); Pet. (No. 71-1040), App. D, 45a-46a; see *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 339, 342-343 (1956).

vened in other proceedings in that court for review of the same opinions.[5]

These respondents, emphatically, want the earliest possible authoritative resolution of the questions raised by Opinions 606 and 606A (and by the January 14 decision of the court of appeals in the collateral proceeding) as to the Commission's jurisdiction over curtailments of United's service obligations. They agree that it is of great importance to the public interest that such a resolution be expedited.

QUESTIONS PRESENTED

(I) In the view of these petitioners the Commission's opinions raise the following question as to its curtailment jurisdiction:

Where an interstate natural gas pipe line has a gas shortage because it has greatly increased its service obligations without a proportionate increase in its gas reserves, has Congress authorized the Commission to

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[5] The three named respondents on January 24, 1972, filed a timely joint petition in the Fifth Circuit (No. 72-1157) for review of the Commission's order of October 5, 1971, in the Curtailment Proceeding, *United Gas Pipe Line Company*, Docket Nos. RP71-29, RP71-120, RP71-99 (Opinion No. 606; Pet. (No. 71-1040) App. E, 55a *et seq.*); rehearing denied December 3, 1971 (Opinion No. 606 A, *id.* 83a). They have also sought and been permitted to intervene in four other proceedings in that court on petitions for review of the same order filed by Louisiana Power & Light Co., *et al.* (No. 71-3429), Gulf States Utilities Co. (No. 71-3627), Mississippi Power & Light Co. (No. 72-1003), and State of Louisiana, *et al.* (No. 72-1220), by orders of January 11, and February 7 and 16, 1972. Petitioners' briefs in those proceedings are due March 3, 1972. (These respondents were not parties to No. 71-2550 in which the Fifth Circuit on January 14, 1972, entered its opinion (Pet. (No. 71-1040) App. A, 1a, *et seq.*) reversing the district court's dismissal (*id.* App. C, 30a, *et seq.*) and remanding with directions the Collateral Proceeding).)

relieve the pipeline of some of its obligations (depriving its customers of their corresponding rights to service) without a hearing or without an application either under section 7(b), for authority to abandon part of its service, or under section 7(c) for certificate authorization for the changed service made necessary by its shortage?

(II) These petitioners generally accept petitioners' statements of the question raised by the court of appeals' decision on the question of the Commission's jurisdiction over transportation of natural gas to serve non-jurisdictional-sale customers by means of certain facilities.

DISCUSSION

I. THE COURT EN BANC SHOULD CONSIDER THE QUESTION OF ITS JURISDICTION

This Court, before taking the unprecedented action[6] of granting certiorari to review an administrative agency's opinions prior to judgment by the court of appeals on review thereof, should consider two questions: (A) whether to do so would delay, not expedite, an authoritative resolution of the important question raised by the Commission's opinions, if this Court should later determine that it lacks appellate jurisdiction until after court of appeals' judgment; (B) whether the broad questions presented by the petitioners as to the Commission's curtailment jurisdiction are ripe for this Court's review, where United has made no effort to invoke, and the Commission has not articulated any consideration of, the particular provisions of the Gas Act that are the only possible sources of such jurisdiction under the principles established by this Court's

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[6] Stern and Gressman, *Supreme Court Practice*, 28-30 (Fourth Edition, 1969).

decisions and by other judicial, and Commission, precedents? Petitioners believe that the answer to each question will require denial of the petitions for review of the Commission opinions.

A. Grant of Writs of Certiorari Might Only Delay Authoritative Decision of the Important Question Raised by Opinion 606.

Grant of certiorari would delay rather than expedite an authoritative resolution of the question raised by Commission Opinion 606 if, after briefs and oral argument, the Court were to conclude that prior to final judgment by the court of appeals this Court has no jurisdiction under Article III, Section 2, Clause 2, of the Constitution,[7] 28 U.S.C., 1254(1), and section 19(b) of the Natural Gas Act.[8] For this reason these respon-

[7] Article III, Section 2, Clause 2, reads as follows: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned [i.e., those to which clause 1 provides "the judicial Power shall extend"], the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make."

[8] Section 19(b) of the Natural Gas Act (52 Stat. 831 (1938); 15 U.S.C. § 717r(b); Pet. (No. 71-1040) App. D, 52a-53a), provides in pertinent part as follows: "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order of the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia . . . by filing . . . a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. . . . The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28."

dents, by motion submitted herewith, are asking the Court to determine whether this novel question of the Court's appellate jurisdiction should be passed on now by the Court *en banc* to avoid the possibility that an improvident grant of certiorari under the so-called "rule of four" might defeat the very end sought by petitioners.

The special provision of the Gas Act conferring exclusive jurisdiction on United States Courts of Appeals to review Federal Power Commission orders under that Act, and providing that the judgment of such court on such review "shall be final subject to *review* by the Supreme Court" [emphasis supplied] constitutes a "distinctive formulation of the conditions under which resort to the courts may be made. . . ." *FPC* v. *Pacific Power & L. Co.*, 307 U.S. 156, 159 (1939).[9]

It would seem that such a special grant of "exclusive" review jurisdiction to the courts of appeals[10] until they reach final judgment has the effect of denying review jurisdiction to this Court on certiorari until then under a line of precedents that goes back to the earliest days of the Court. *Wiscart* v. *D'Auchy*, 3 Dall (3 U.S.) 321 (1796); *Durousseau* v. *United States*, 6 Cranch (10 U.S.) 307, 311 (1810); *Ex Parte Vallandig-*

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[9] Section 19(b) of the Gas Act is the counterpart of Section 313(b) of the Federal Power Act (49 Stat. 860, as amended, 16 U.S.C. 825l. The pertinent parts of 19(b) quoted in note 8, *supra*, are identical to those of 313(b) involved in *Pacific Power*, except for the substitution of the words "natural gas company" for the words "licensee or public utility." See also *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 211-212 (1964).

[10] The jurisdiction thus conferred has been held exclusive of district court jurisdiction conferred by an earlier, not expressly repealed statutory provision. *Safe Harbor Water Power Corp.* v. *FPC*, 124 F.2d 800, 803-805 (3rd Cir. 1941), *certiorari denied*, 316 U.S. 663.

ham, 1 Wall (68 U.S.) 243, 251 (1864); *Ex Parte McCardle*, 7 Wall (74 U.S.) 506, 513-15 (1869); *The "Francis Wright,"* 105 U.S. 381, 385 (1881); *American Construction Co.* v. *Jacksonville, (Etc.) Ry.*, 148 U.S. 372 (1893); *Colorado Central Consolidated Mining Co.* v. *Turck*, 150 U.S. 138, 141 (1893); *Missouri* v. *Pac. Ry. Co.*, 292 U.S. 13, 15 (1934); *Stephan* v. *United States*, 319 U.S. 423, 426 (1943); *The Glidden Co.* v. *Zdanok*, 370 U.S. 530, 567-68 (1962); *Flast* v. *Cohen*, 392 U.S. 83, 109 (1968, concurring opinion); 1 Moore's Federal Practice ¶ 0.7[2] (Second Edition, revised 1971).

B. It Is Doubtful That the Broad Questions of Curtailment Jurisdiction Presented by the Petitions Are Ripe for This Court's Review.

Each petition presents its question relating to the Commission's curtailment jurisdiction in the broad terms of jurisdiction (or authority) under the entire Gas Act. Moreover, each involves the unprecedented[11] and constitutionally dubious asserted Commission authority, by the mere acceptance of United's tender of a change in its filed rate tariff, to immediately and with finality relieve United of legal obligations to serve its customers[12] (and to deprive its customers of their

[11] The attempt of the Commission to curtail service under the rate sections of the Act in *City of Detroit* v. *Panhandle Eastern Pipe Line Co.* (6 F.P.C. 196 (1947)), was made effective only after notice, hearing, and findings. See *infra*, p. 12, and n. 24.

[12] Such obligations may exist under (1) its contracts (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338-339 (1956)); (2) its certificates of public convenience and necessity issued by the Commission (*United Gas Pipe Line Co.* v. *FPC*, 383 U.S. 83 (1966); *Sun Oil Co.* v. *FPC*, 364 U.S. 170 (1960)); (3) its historical service-pattern (*Granite City Steel Co.* v. *FPC*, 115 U.S. App. D.C. 392, 394, 320 F. 2d 711, 713 (1963)); or (4) the Gas Act, of itself, directly (*J. M. Huber Corp.* v. *FPC*, 236, F. 2d 550, 556-557 (3rd Cir. 1956)).

rights to be served) [13] during the pendency of the very hearing the Commission found necessary to determine whether such changes are lawful.[14] And this, without any provision for indemnification of persons injured by any curtailments ultimately determined to be lawful.[15] The obvious Due Process question has been wholly ignored by petitioners.

Two questions arise. The first is whether such a filing of a rate tariff change and acceptance thereof by the Commission under sections 4(d) and 4(e) of the Act can effectuate any change in United's legal obligations, absent power otherwise derived by United, to make such a change in service. For sections 4(d) and 4(e) are not a grant of power to change, but a prohibition of change without giving notice by such filing. United's power to make such change depends on provisions of the sections of the Act not invoked here because United did not file the prescribed application.

The resulting question is whether the issue thus presented is ripe for review by this Court, inasmuch as neither petition has addressed itself to the question of ripeness of the question of the Commission's overall

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[13] R. 9134-40; Pet. (No. 71-1040), App. E, 75a, 79a.

[14] Pet. (No. 71-1040), App. E, 57a.

[15] The rate sections of the Act in terms purport to authorize or provide two methods of indemnification: (1) up to five months suspension of the operation of the new rate (Pet. (No. 71-1040), App. D, 45a-46a), see *Hope Natural Gas Co.* v. *FPC*, 196 F. 2d 803 (1952), rehearing denied, 197 F. 2d 522 (1952); (2) bond for refund of any excess of the changed rates collected not ultimately found justified (*id.* 46a). The refund of excess collections has no relevance to a curtailment of service and the Commission's refusal to suspend in RP71-120 for more than a nominal one day highlights the constitutional infirmity of its interpretation. R. 9185; Pet. (No. 71-1040), App. E, 79a, 81a.

curtailment powers where its powers under the service provisions have not been invoked. The answers to these questions must start with an understanding of the Commission powers that were attempted to be invoked in the proceedings before it.

The limited basis of Commission jurisdiction actually invoked.—The Commission proceeding was begun by United's filing of a petition under section 554(e) of the Administrative Procedure Act [16] for a declaratory order approving a newly proposed interpretation of its existing filed rate tariff as giving it the right, in the event it did not have enough gas to supply the requirements of all its customers, to curtail its jurisdictional-sale customers ratably with its non-jurisdictional-sale customers, on the volumes of gas used for industrial purposes. United obviously expected that a favorable ruling, even though issued after the end of the program of curtailments based on that interpretation for the 1970-71 winter heating season then just beginning, would retroactively absolve it from any legal liability arising out of those curtailments.

But United's new interpretation was challenged on the grounds that it is contrary to the unambiguous meaning of its tariff;[17] that that meaning had been corroborated by the actual curtailments United had made in the 1969-1970 winter to meet the onset of its present shortage,[18] and by United's ensuing explanation of the rights of its customers;[19] and that it accorded with the dominant purpose of Congress in passing the Gas Act

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[16] 5 U.S.C. § 554(e).

[17] R. 8669; 8703; 9018-21; 9024; 9083-86.

[18] R. 1188-89.

[19] R. 1252, 1254-1258, 2333-2334.

to protect the consuming public served by local distributors that are dependent on out-of-state gas, from the "Attleboro Gap" in the regulatory jurisdiction of the state agencies.[20]

For the next winter, 1971-1972, United filed a revision of its tariff, which included provisions corresponding to the interpretation for which it had sought Commission approval, as a tariff change under sections 4(d) and 4(e).[21]

Thus the only attempts that have yet been made to invoke Commission curtailment powers all depend on the proposition that a pipeline's filed rate tariff fixes its service obligations, and that a change in the filed tariff can change those obligations.

Insufficiency of that basis under principles of decisions of this Court.—While a jurisdictional pipeline's contracts, or "service agreements," with its customers may throw light on what the pipeline's service

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[20] Section 1(a) of the Gas Act (Pet. (No. 71-1040), App. D, 43a. ". . . The Act, though extending federal regulation had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. . . ." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 517 (1947).

See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 681-684 (1954); *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 212-214 (1964); DeVane, *Highlights of the Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30 (1945) ("a new pattern of federal and state relationship," p. 35); Benton, *Jurisdiction of the Federal Power Commission and of State Agencies in the Regulation of the Electric Power and Natural Gas Industries*, 14 Geo. Wash. L. Rev. 53, 55-56, 64, 69-70, 71-72 (1945).

[21] Pet. (No. 71-1040), App. D, 45a-46a; *id.* App. E, 58a-59a.

obligations are, they do not limit those obligations.[22] *Sun Oil Co.* v. *FPC*, 364 U.S. 137, 143, 153, 155, 156 (1960). Hence United's filed tariff cannot be treated as limiting its service obligations, because the provisions of its service agreements here involved are prescribed by its filed tariff and the service agreements incorporate the pertinent parts of the tariff.

Moreover, *United Gas Pipeline Company* v. *Mobile Gas Service Co.*, 350 U.S. 332, 339, 342-343, makes specifically clear, at least with respect to changes in rates, that section 4(d)

> . . . is simply a prohibition, not a grant of power. . . . The section says only that a change *cannot* be made without proper notice to the Commission; it does not say under what circumstances a change *can* be made. . . . If the purported change is one the natural gas company has the power to make, the "change" is completed upon compliance with the notice requirement. . . .

What is thus true for changes in rates must necessarily be true for changes in service, for both are covered by the same statutory words, with nothing in the circumstances to warrant distinction. In the case of a change in service, the required "power" to make a change in service depends on the pipeline's compliance

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[22] The Commission's own regulations provide that the filing of rate schedules does not dispense with the necessity for certificate authorization. 18 C.F.R. § 154.22.

The Commission's administration of the certificate provisions of the Act has left much to be desired so far as the definition of service obligations is concerned. In the not unusual absence of adequate documentary definition, the pattern of the service that has actually been rendered may be determinative. *Granite City Steel Co.* v. *FPC*, 115 U.S. App. D.C. 392, 320 F.2d 711, 713 (1963). Historically, United has supplied "all requirements" of its gas utility customers and ignored the contract maximum limitation. R. 845, 2309, 2331-2333, 2336-2337.

with the provisions of section 7 relating to service. *Cf., South Georgia Natural Gas Co.*, 23 F.P.C. 795, 797 (1960), on which Opinion 606 relies.[23] There has been no such compliance here.

Conflict in principle with Sixth Circuit decisions.— The Commission's only previous attempt to curtail service under the rate sections of the Act was a series of annual orders growing out of the post-World War II failure of one jurisdictional pipeline to increase its transmission capacity rapidly enough, and the resulting shortage of gas to meet its customers' requirements. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 F.P.C. 196 (1947). None of those orders was judicially reviewed. But the Commission's claimed basis for its curtailment rules in the rate sections of the Act was impliedly rejected in collateral litigation.[24]

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[23] Pet. (No. 71-1040) App. E, 64a-65a. In *South Georgia* the Commission required a jurisdictional pipeline to apply for a new certificate for a changed service that consisted of selling gas to a municipality for its own boiler fuel use under a separate non-jurisdictional contract where the gas had formerly been sold under a jurisdictional service agreement that covered both supply of gas for that purpose and for resale by the municipality. The Commission denied a certificate for transportation for the new service. Court review was not sought.

See also *Dixie Pipe Line Co.*, 14 F.P.C. 106 (1955).

[24] Twice the Sixth Circuit declared that the Commission's order had been accepted as valid for the purpose of the case before it, but each time, in holding that a complaint for injunctive relief from the curtailment should be dismissed for failure to exhaust administrative remedies before the Commission, it pointedly ignored the Commission's claimed basis of jurisdiction. In one case it held that the Commission had jurisdiction under the provisions of section 7(a). (Pet. No. 71-1040) App. D, 47a-48a) relating to improved or new service (*Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 788-89 (6th Cir. 1949)); in the other, under the provisions of section 7(b) (*id.* 48a) relating to abandonment of service (*Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 117 F. 2d 942, 943, 945 (6th Cir. 1949)).

Lack of support in the cited cases.—In relying on *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 523 (1947),[25] as implying that the Commission has curtailment jurisdiction, Commission Opinion 606 omits a footnote [26] to its quotation from that opinion [27] which plainly suggests that the Court's reference to the Commission's jurisdiction was a reference to its section 7(e) [28] authority to condition certificates issued under section 7(e) of the Act.

All of the other cases cited in Opinion 606 to support jurisdiction founded on the rate filing sections involve the exercise of jurisdiction under the service provisions of section 7.[29]

The limitations on such curtailment powers as have been conferred on the Commission may not be circumvented.—The benefits obtainable under the service provisions of the certificate sections of the Act (sections 7(b) and 7(c) are available only on application (*United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83, 91 (1966)), and then only prospectively after notice, hear-

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[25] Pet. (No. 71-1040) App. E, 62a-63a, 64a, 70a-71a.

[26] 332 U.S. at 523, n. 23.

[27] Pet. (No. 71-1040), App. E, 63a.

[28] Pet. (No. 71-1040), App. E, 49a-50a.

[29] *Michigan Consolidated Gas Co.* v. *FPC*, 203 F.2d 895, 900, 204 F.2d 675 (3rd Cir. 1953); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 226 F.2d 60 (6th Cir. 1955), *certiorari denied*, 350 U.S. 987 (1956) (nothing in this case indicates any change in the Sixth Circuit's position in the earlier cases discussed, *supra*, p. 14, n. 24); *Panhandle Eastern Pipe Line Co.* v. FPC, 232 F.2d 467, 471-472 (3rd Cir. 1956), *certiorari denied*, 352 U.S. 891 (1956).

ing, findings, and issuance of an order.[30] These requirements and limitations have regard for the substantive rights of the affected customers and are not to be circumvented by saying, "The form of filing is not the controlling consideration," as Opinion 606A says, or as Opinion 606 suggests, that the assumed purpose of one section of the Act can be carried out by the exercise of the power conferred by another section,[31] without regard to the manifest limitation of the assumed purpose by the limitation of the powers specifically provided for its implementation.[32]

The Commission itself has recognized its inability to support its present jurisdictional claim. About the time United initiated the curtailment proceeding, the Commission asked Congress for new legislation to give it the jurisdiction it now claims it already has.[33]

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[30] Sections 7(c) and 7(e), Pet. (No. 71-1040), App. D, 48a-50a. Temporary certificates may be issued *pendente lite* only under rigidly circumscribed conditions, to "maintain," not curtail service, and only to persons who have made application for a permanent certificate (section 7(c), *id.* 49a).

[31] Pet. (No. 71-1040), App. E, 85a; *id.* 65a.

[32] The attempted use of the statutory rate filing provisions as authority for changes in service obligations and rights but without suspension of the changes or indemnification for any damages from the interim implementation of any changes ultimately found unlawful (*supra*, p. 8, n. 15), and the prolongation of the proceedings beyond the end of the season involved, coupled with the repetition of the entire process season after season, accompanied by unabashed proclamations that judicial protection and relief are unavailable (*supra*, p. 8, n. 13), have deeply disturbing overtones.

[33] "Spot shortages of natural gas which became apparent during the fiscal year and which are expected to increase in the foreseeable future suggest urgent need for congressional action to alleviate these problems and that the Commission's jurisdiction to do so should not be subject to challenge. This proposal which would add a new subsection to section 7 of the Natural Gas Act would enable

II. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE SUMMARILY REVERSED FOR FAILURE TO FOLLOW THE EXHAUSTION RULE.

The first time this Court was presented with a Federal Power Commission petition for certiorari to review a court of appeals judgment like that of the court of appeals in the Collateral Proceeding, this Court summarily reversed the court of appeals by a *per curiam* opinion announced four days after oral argument. *FPC* v. *Arkansas P. & L. Co.*, 330 U.S. 802, rehearing denied, 330 U.S. 856 (1947). The court of appeals in its January 14, 1972, opinion did not undertake to explain its failure to follow *Arkansas Power & Light* or how it reached the conclusion it did by applying Professor Davis' "three-part test."[34]

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the Commission to determine when an emergency exists so as to require the construction of temporary connections of facilities and extensions of facilities and the delivery, interchange, transportation, *load curtailment and allocation of gas by any gas company*, whether or not it is otherwise subject to the Commission's jurisdiction. Undisputed authority to meet such crises as they arise is necessary for effective regulation of the natural gas industry. [Emphasis supplied.]" (FPC, Annual Report, 1970 (January 21, 1971), 8.)

[34] Pet. (No. 71-1040), App. A, 25a-26a. None of the three "factors" Professor Davis proposes as bases for reconciliation of the differences he finds in the decisions in his most recent volume (Davis, Administrative Law Text, 387 [West, 1972]) affords any basis for the conclusion reached by the court of appeals. They are: ". . . extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and specialized administrative understanding in the question of jurisdiction. . . ."

The last factor would seem clearly not to support the court of appeals conclusion. *Cf. FPC* v. *Florida P. & L. Co.*, — U.S. —, 30 L. Ed. 2d 600 (January 12, 1972), reversing 430 F.2d 1377 (5th Cir. 1970). The second factor is immaterial here, for the Commission's jurisdiction to determine its own jurisdiction in such circumstances has been well established since *Jersey Central P. & L. Co.*

These respondents therefore submit that the Court should again enter a summary reversal of the court of appeals failure to follow the exhaustion rule, this time on the petitions for certiorari and responses. If this is done, the questions of the merits of the court of appeals ruling on jurisdiction will not be taken up with the tunnel vision that would be imposed if review of that ruling were to be undertaken apart from the record and Commission opinions 606 and 606A.

CONCLUSION

(1) For the foregoing reasons there is serious doubt, wholly apart from the question of this Court's jurisdiction under the Constitution and section 19(b) of the Gas Act, that the broad questions presented by the petitions as to the Commission's powers to curtail service obligations are now ripe for this Court's review, in view of the failure to invoke or consider the only provisions of the Act that Commission or court precedents have suggested may confer such jurisdiction. If not, granting these petitions may not expedite the needed authoritative determination of those questions.

It would also seem, with all deference, that in the unusual circumstances here involved, the Court's jurisdiction to review the Commission's opinions pursuant to these petitions should be considered by the Court *en banc* and denied.

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v. *FPC*, 319 U.S. 61 (1943). The first factor here calls for a balancing of injuries among classes of customers, and the district court is in no position to weigh the injuries to Louisiana P. & L. Co. against those to United's other classes of customers. The gas that is allowed to direct industrial customers is gas withheld from the public served by United's jurisdictional sale customers. In this particular respect (see the Commission's opinion on the jurisdictional question, which has already been issued, Pet. (No. 71-40), App. F, 91a), the "injury factor" would seem immaterial.

(2) The court of appeals judgment on appeal from the district court should be summarily reversed for failure to follow the exhaustion rule.

Respectfully submitted,

HOWARD E. WAHRENBROCK
Attorney for Respondents
CLARKE-MOBILE COUNTIES GAS DISTRICT,
MOBILE GAS SERVICE CORPORATION,
MISSISSIPPI VALLEY GAS COMPANY,
Room 605, 1725 K Street, N.W.
Washington, D.C. 20006

JOHN M. KUYKENDALL, JR.
Attorney for Respondent
MISSISSIPPI VALLEY GAS COMPANY
P.O. Box 961
Jackson, Mississippi 39205
Washington, D.C.

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